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In the Supreme Court of the United States

OCTOBER TERM, 1990

NORTH BAY DEVELOPMENT DISABILITIES SERVICES, INC., D/B/A NORTH BAY REGIONAL CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the amount of an agency shop fee is not a mandatory subject of bargaining and therefore the Union did not violate Section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. 158(b)(3), by refusing the employer's request for financial information pertaining to the amount of that fee.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 905 F.2d 476. The decision and order of the National Labor Relations Board (Pet. App. 8a-25a) are reported at 287 N.L.R.B. 1223. The order of the National Labor Relations Board denying a request for stay and motion for reconsideration (Pet. App. 27a-28a) and an order of the National Labor Relations Board correcting that order (Pet. App. 26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1990. On August 30, 1990, Chief Justice Rehnquist granted an extension of time to and including October 5, 1990, within which to file a petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In October 1986, petitioner and the Social Services Union, Local 535, Service Employees International Union, AFL-CIO (the Union), executed a collective-bargaining agreement that required covered employees either to join the Union or to pay an "agency fee" to cover the costs of union representation.[1] Under the agreement, the amount of the agency fee was to be negotiated between petitioner and the Union. Pet. App. 12a-13a. Petitioner proposed an agency fee equal to 20% of the periodic dues paid by Union members, and requested that if the Union found this amount unacceptable, it supply to petitioner a "detailed breakdown of all revenues and expenditures" of the Union and its parent International for the current and previous three years. *Id.* at 14a-15a.

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[1] An agency shop fee is the amount non-member employees subject to a union security contract are required to pay the union in lieu of dues. That amount may not exceed the employees' pro rata share of the union's costs of performing such activities as collective bargaining, contract administration, and grievance adjustment as exclusive representative of the employees. *Communication Workers* v. *Beck*, 487 U.S. 735, 762-763 (1988).

When the Union did not agree to the 20% figure and refused to furnish the requested information, petitioner invoked the collective bargaining agreement's arbitration clause. Pet. App. 15a-16a. Petitioner also filed an unfair labor practice charge against the Union, alleging that the Union's refusal to furnish the requested information violated Section 8(b)(3) of the National Labor Relations Act (the Act), 29 U.S.C. 158(b)(3). The General Counsel of the National Labor Relations Board issued a complaint against the Union based on that charge. Pet. App. 2a, 10a.

2. The administrative law judge held that "fees imposed by labor organizations are part of their internal relations with employees[,] and * * * are * * * no[t] a mandatory subject of bargaining." Pet. App. 19a. He ordered the complaint dismissed. The Board agreed, concluding that "the amount of agency fees is a nonmandatory subject of bargaining and that it is not transformed into a mandatory subject by virtue of the parties' agreement to bargain concerning it." *Id.* at 9a n.1, 17a-19a. Since "the duty to provide information is coextensive with the statutory duty to bargain concerning mandatory subjects" only, the Board also concluded that the Union had no duty to furnish the requested information. *Id.* at 8a-9a & n.1, 24a-25a. The Board adopted the recommended order of the administrative law judge and dismissed the complaint.

3. The court of appeals affirmed the Board's decision and denied the petition for review. Pet. App. 7a. The court first pointed out its "narrow" scope of review in light of the Board's "special expertise" in determining whether a matter falls within the "terms and conditions of employment" and is there-

fore subject to mandatory bargaining. *Id.* at 3a. The court concluded that the Board's position was "reasonably defensible" because "the amount of an agency fee concerns primarily the relationship between the union and the non-member employee," and not the relationship between the employer and its employees. *Id.* at 4a.

The court rejected petitioner's argument that the Board's decision was inconsistent with *Communication Workers* v. *Beck*, 487 U.S. 735 (1988). Noting that the *Beck* case "arose from a dispute between an employee and a union," and did not involve the issue of mandatory bargaining, Pet. App. 5a, the court read the case as "support[ing] the Board's position: because an agency fee must be based upon a union's representational expenses, it does not make sense to force a union to bargain with an employer over the amount of the fee, lest the resulting figure reflect the parties' relative bargaining strengths rather than the amount chargeable by some objective standard." *Ibid.*

Finally, the court agreed with the Board that the parties' agreement to bargain over the agency fee did not make it a mandatory subject, and that, because it was not a mandatory subject, the Union's refusal to furnish the requested information was not a violation of the Act. Pet. App. 6a.

ARGUMENT

The amount of an agency shop fee concerns primarily the relationship between a union and nonmember employees, not the relationship between an employer and its employees. Thus, that amount is not a term or condition of employment subject to mandatory bargaining. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. The National Labor Relations Act limits the subjects of mandatory collective bargaining to "wages, hours and other terms and conditions of employment." See Section 8(d) of the Act, 29 U.S.C. 158(d). "As to other matters, however, each party is free to bargain or not to bargain." *NLRB* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).[2] This Court has recognized the Board's "special expertise" in determining what is, and what is not, a mandatory subject. *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 495 (1979) (the determination "l[ies] at the heart of the Board's function"). Thus, the

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[2] The duty to bargain includes the obligation to provide necessary information that is relevant to issues about which the parties are obligated to bargain. *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 317-320 (1979); *Local 13, Detroit Newspaper Printing Union* v. *NLRB*, 598 F.2d 267, 270 (D.C. Cir. 1979). However, because the duty to furnish information derives from the duty to bargain, there is no duty to furnish information concerning topics that are not mandatory subjects of bargaining. *Western Massachusetts Elec. Co.* v. *NLRB*, 573 F.2d 101, 109-110 (1st Cir. 1978). Thus, contrary to petitioner's assertion (Pet. 9), the central issue of this case is whether or not the amount of an agency fee is a non-mandatory subject of bargaining.

Court will defer to the Board's decisions if they are "reasonably defensible." *Id.* at 497.

Although Section 8(d) "does not immutably fix a list of subjects for mandatory bargaining," *Allied Chem. Workers Local Union No. 1 (Chemical Workers)* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971), the list is limited to "issues that settle an aspect of the relationship between employer and employees." *Ibid.* Matters that involve relations between employees and the union are not terms and conditions of employment. See *ibid*; *Borg-Warner*, 356 U.S. at 350. In this case, the amount of money paid by employees to compensate the Union for its efforts in their behalf is a matter that concerns the relationship between the Union and the employees and has little, if anything, to do with the relationship between petitioner and its employees. Therefore, the court of appeals correctly deferred to the Board's determination that the amount of the agency shop fee was not a mandatory bargaining subject. The Board's conclusion is especially reasonable in light of the "policy Congress incorporated into the Act against outside interference in union decision-making." *NLRB* v. *Financial Inst. Employees*, 475 U.S. 192, 204 (1986).

2. Petitioner's contentions to the contrary lack merit. Petitioner principally contends (Pet. 8-9, 13-17) that the court of appeals' decision conflicts with *Communications Workers* v. *Beck*, 487 U.S. 735 (1988). This contention is incorrect. *Beck* held that an agency fee may not exceed an individual nonmember's proportional share of the union's expenses "germane to collective bargaining, contract administration, and grievance adjustment." 487 U.S. at 745. As the court of appeals correctly observed, that decision "has no direct bearing on this case, * * * be-

cause it arose from a dispute between an employee and a union over the amount of the agency fee, and did not raise the issue of whether the amount is a subject of mandatory bargaining between a union and an employer." Pet. App. 5a. Moreover, as the court of appeals cogently noted, the Board's decision is consonant with *Beck*'s holding that an agency fee cannot exceed a union's representational expenses. "[I]t does not make sense," the court said, "to force a union to bargain with an employer over the amount of the fee," for then "the parties' relative bargaining strengths," rather than an "objective standard," become determinative of the amount. *Ibid.*

Petitioner also incorrectly contends (Pet. 10) that *Borg-Warner* and other cases relied upon by the court of appeals are inapposite because they involved the relationship of a union to its members, while this case involves non-members. *Borg-Warner*, *Chemical Workers*, and the other cases relied on below hold that the scope of Section 8(d) is limited to matters that concern the relationship between the employer and its employees. Those cases draw no distinction between members and non-members. Plainly, the amount of money non-members must pay a union to represent them pertains primarily to the relationship between employees and the union, and not between the employees and their employer. The cases on which the court of appeals' opinion is based fully support its conclusion.

Petitioner contends (Pet. 13), again erroneously, that since the question whether or not to have an agency fee is a mandatory subject of bargaining under *NLRB* v. *General Motors*, 373 U.S. 734, 745 (1963), "the entire matter is open to negotiation," including, presumably, the amount of any such fee. If this argument had merit, then the amount of union

dues would also be a mandatory bargaining subject. However, both member's dues and the amount a union will spend on representation are quintessentially "internal union matter[s] of no proper concern to the employer." Pet. App. 5a. See *Financial Inst. Employees*, 475 U.S. at 204 n.11 (Congress rejected proposal that would have allowed Board to regulate dues); *Metal Workers Alliance, Inc.*, 172 N.L.R.B. 815, 815-816 (1968) (fees imposed by labor organizations subject to Board scrutiny "only in limited situations"); see also *United Steelworkers* v. *Sadlowski*, 457 U.S. 102, 117 (1982) (unions should be free to operate their own affairs). No different conclusion is required because a union may not fully protect the rights of non-members. The Court made plain in *Financial Inst. Employees* that the Board is not empowered to monitor more closely union internal policies on the ground that the "statutory scheme does not adequately protect [non-members'] interests." 475 U.S. at 205-206 (Board could not require non-member voting in union-conducted affiliation election). *Cf. Pattern Makers League* v. *NLRB*, 473 U.S. 95, 106 (1985) (Section 8(a)(3) of the Act "protects the employment rights of * * * the worker who never assumed full union membership").[3]

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[3] Petitioner asserts that the decision below "suggest[s] that collective bargaining as to the amount of agency fees is unlawful," and that the decision is thus at odds with *NLRB* v. *American Nat'l Ins. Co.*, 343 U.S. 395 (1952). Pet. 11. The decision below contains no such suggestion; it considers not whether the parties *may* bargain over the amount of an agency fee, but whether they *must*. And *American Nat'l Ins.* does not bear on that issue. Its holding—that the extent of management's retention of certain functions and prerogatives relating to its employees is a "condition of employment"

Nor is there merit to petitioner's assertion (Pet. 11, 20, 22, 23, 24) that the amount of agency fees became a mandatory bargaining subject "[b]ecause Petitioner * * * and the union had an express agreement to negotiate over the agency shop fee and to terminate any dispute in arbitration." Pet. 23. This Court rejected that argument in *Chemical Workers*, holding instead that a unilateral modification of (and refusal to negotiate over) contractual terms "is a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissible subject of bargaining." 404 U.S. at 185. *Chemical Workers* added that "[b]y once bargaining and agreeing on a permissive subject, the parties * * * do not make the subject a mandatory topic of future bargaining"; rather, Section 8(d) has a "more specialized purpose than merely promoting general contract compliance." 404 U.S. at 187.[4]

Petitioner also mistakenly relies (Pet. 12-23) on *Ford Motor Co.* v. *NLRB*, 441 U.S. 488 (1979), where the Court affirmed a Board determination that the prices at in-plant cafeterias and vending machines constituted a mandatory subject of bargaining. In fact, *Ford Motor* supports the Board's position here, as it illustrates the kind of issue that directly implicates the employer/employee relationship, as opposed to the union/employee relationship at issue in this case. The "determinative aspect" of *Ford Motor*, Pet.

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subject to mandatory bargaining—sheds no light on the status under the Act of matters involving the relationship of the union to the employees it represents.

[4] The Court noted that "[t]he remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract, * * * not in an unfair-labor-practice proceeding." 404 U.S. at 188.

22, was not, as petitioner asserts, that the parties had bargained over the issue before. Rather, it was that such prices "are matters of deep concern to workers" and are "germane to the working environment," and that "substantial" and "recurring disputes" arise over them that are well suited to resolution through collective bargaining. 441 U.S. at 498-499.[5]

Finally, there is no merit to the claim (Pet. 17-18) that, under the court of appeals' holding, petitioner would be guilty of an unfair labor practice for withholding from an employee's pay an excessive agency fee or for firing an employee who fails to pay such a fee. As the court of appeals noted (Pet. App. 5a-6a), an employer does not commit an unfair labor practice in those circumstances "unless [it] had reason to believe that the fee was unlawful." See *Helmsley-Spear, Inc.*, 275 N.L.R.B. 262, 268 (1985) (employer did not violate the Act by discharging employee pursuant to union's unlawful request where employer lacked reasonable ground to believe that request was unlawfully motivated).[6] *Helmsley-Spear* illustrates

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[5] Similarly incorrect is petitioner's suggestion that the amount of the fee is an "aspect of the employment relationship" because the agency fee is taken "out of wages which would otherwise be paid to [non-member employees] by their employer." Pet. 21. As explained above, regular member dues are not part of the employment relationship, although they too are typically withheld by the employer.

[6] Moreover, as the court of appeals noted, the Board has not yet addressed "the means by which an employee may properly challenge the level of an agency fee." Pet. App. 6a. The Board may reasonably conclude on this point that the employer should not become the representative of its employees' interests. Cf. *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 50 n.16 (1987), quoting *Brooks* v. *NLRB*, 348 U.S. 96, 103 (1954) ("inimical" to "industrial

once more that the amount of the fee concerns the employees' relationship with the union and has little to do with their relationship with the employer. The Board was eminently justified in determining that the agency fee was not a mandatory subject of collective bargaining.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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peace" to allow employers to assert and rely on employees' rights).

[7] The *amicus curiae* brief of Karen Fuller, an employee of petitioner, reiterates petitioner's arguments and reflects the same erroneous reading of *General Motors*, *Beck* and the other cases discussed herein.

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